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Island Hospitality Management II, LLC d/b/a/ Hampton Inn—Long Island Brookhaven and New York Hotel and Motel Trades Council, AFL–CIO. Case 29–CA–274600

May 31, 2022

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS RING
AND WILCOX

On December 1, 2021, Administrative Law Judge Jeffrey P. Gardner issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge’s rulings, findings,¹ and conclusions and to adopt the recommended Order.

¹ Contrary to our dissenting colleague, we conclude that the employees’ petition to the Respondent, understood in context, does more than express dissatisfaction with the Union, but rather clearly indicates the desire of a majority of employees to end union representation. *Highlands Regional Medical Center*, cited by the dissent, is distinguishable. There, in finding the employer’s withdrawal of recognition unlawful, the Board relied on the fact that written and oral statements made in connection with the gathering of employee signatures demonstrated that the petition did not show that the union had actually lost majority status. 347 NLRB 1404, 1405 (2006). Documents provided to the employer established that the signatures were gathered for the purpose of obtaining a decertification election. *Id.* at 1406. Additionally, credited testimony established that some employees signed the petition after being told that it would only be used to obtain an election, and at least one employee would not have signed the petition if she had known that it would be used as the basis for withdrawing recognition. *Id.* On these facts, the Board found the withdrawal of recognition unlawful. No such facts are present here.

Chairman McFerran does not rely on *Wurtland Nursing & Rehabilitation Center*, 351 NLRB 817 (2007), to the extent that the judge relied on that decision. Chairman McFerran questions the rationale expressed in *Wurtland* that a request for a decertification election, even if the requesting document indicates how employees intend to vote, is objective evidence of a loss of majority support. Member Ring believes *Wurtland* was correctly decided, and he adheres to that decision.

Member Wilcox would reverse the judge and find that the Respondent violated Sec. 8(a)(5) and (1) by withdrawing recognition from New York Hotel and Motel Trades Council, AFL–CIO (the Union). As the judge found, the employees, who were primarily Spanish speakers, delivered a petition to the Respondent that stated, in relevant part, that the employees “disagree with a union being brought in.” Below the English-language text, the petition also stated: “no estamos de acuerdo con la incorporación de un sindicato.” While Member Wilcox agrees that the petition reflects the employees’ dissatisfaction with the Union,

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. May 31, 2022

Lauren McFerran, Chairman

John F. Ring, Member

Gwynne A. Wilcox, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Paul Rosenberg, Esq. and Carlos Torejon, Esq., for the Respondent.

Gideon Martin, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

JEFFREY P. GARDNER, Administrative Law Judge. The charge in Case 29–CA–274600 was filed on March 19, 2021. a complaint and notice of hearing was issued on May 17, 2021, alleging Respondent violated Section 8(a)(5) and (1) by with-

she would find merit in the General Counsel’s argument on exception that the petition lacks sufficient clarity to constitute objective evidence of an actual loss of majority support under *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001). Specifically, Member Wilcox observes that the petition does not show “opposition to union representation itself” or otherwise call on the Respondent to cease recognizing and bargaining with the Union. *Id.* at 728; see also *Highlands Regional Medical Center*, 347 NLRB 1404, 1406 (2006) (withdrawal of recognition unlawful primarily because “the petition [did] not state that the signers desire not to be represented by the Union, nor [did] it request that the Respondent withdraw recognition from the Union”), *enfd.* on other grounds 508 F.3d 28 (D.C. Cir. 2007). As the Board explained in *Levitz*, “there are compelling legal and policy reasons why employers should not be allowed to withdraw recognition merely because they harbor uncertainty or even disbelief concerning unions’ majority status,” including the Board’s obligation to promote stable collective bargaining. *Levitz*, 333 NLRB at 717. Because Member Wilcox would find that the petition solely expresses employees’ frustration with the Union and falls short of demonstrating an actual loss of majority support, she would find that the Respondent was not justified in withdrawing recognition in reliance on the petition. She regards *Wurtland*, *supra*, 351 NLRB at 817, which involved a petition containing explicit language regarding employees’ sentiments regarding representation itself, as distinguishable. See *Liberty Bakery Kitchen, Inc.*, 366 NLRB No. 19, slip op. at 1 fn. 1 (2018) (finding *Wurtland* distinguishable in a case involving a petition that “contained no statement of the employees’ desires concerning union representation”).

drawing recognition of the Union as the exclusive collective-bargaining representative of the unit. (GC Exh. 1). On May 25, 2021, Respondent filed its answer admitting most of the procedural and substantive allegations but asserting that it lawfully withdrew recognition.

On July 21, 2021, pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations, the General Counsel and Respondent submitted a Joint Motion to try complaint on the basis of stipulation. An amended Joint Motion was filed on July 28, 2021. On July 28, 2021, the Charging Party filed a response to the Joint Motion, objecting on limited grounds only.

The record in this case consists of the formal papers, a stipulation by the General Counsel and Respondent together with supporting exhibits, the Joint Motion and the response of Charging Party. By Order dated July 30, 2021, the I granted the Joint Motion and approved the stipulation. I also set a date for the filing of briefs. The General Counsel and Respondent each filed timely briefs, which I have read and considered.¹

Upon consideration of the briefs, and the entire record, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that it is a domestic corporation, with an office and place of business located at 2000 North Ocean Ave., Farmingville, New York, and has been engaged in the hospitality business, providing room accommodations to members of the general public. Respondent further admits, and I find, that in conducting its business operations it derives gross revenues in excess of \$500,000 and purchases goods and supplies valued in excess of \$5000 directly from suppliers located outside the State of New York.

Accordingly, I find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent admits and I further find that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Facts

On March 7, 2019, pursuant to a Stipulated Election Agreement, the Board conducted a representation election among the employees in the following bargaining unit (the unit):

All full-time and regular part-time housekeeping employees, room attendants, housepersons, laundry attendants, breakfast attendants, and maintenance/drivers employed by Respondent at the hotel located at 2000 North Ocean Ave., Farmingville, New York, and excluding all other employees, including professional employees, clerical employees, guards and supervisors as defined by the Act.

On July 29, 2019, Region 29 issued a Certification of Representative, certifying the New York Hotel and Motel Trades Council, AFL-CIO (the Union) as the exclusive collective-bargaining representative of the unit. Shortly thereafter, by

letter dated August 6, 2019, the Union requested to bargain with Respondent. Respondent denied the Union's request on August 6, 2019, stating that it intended to file a request for review of the Certification of Representative.

On August 7, 2019, the Union filed an earlier unfair labor practice charge with the Board, alleging that Respondent was failing to bargain with the duly certified collective-bargaining representative of the unit. On August 12, 2019, Respondent filed its request for review of the Certification of Representative. On November 21, 2019, the Board denied Respondent's request for review, and that same day, the Regional Director of Region 29 made a merit determination in the Union's ULP charge.

On December 20, 2019, all parties entered into an Informal Settlement Agreement wherein Respondent agreed to recognize and bargain with the Union as the collective-bargaining representative of the unit, extend the Union's certification year for 1 year from the date bargaining began, and post a notice to employees advising them as much.

The parties commenced bargaining in January 2020, and continued for over a year, until March 2021, meeting and bargaining for an initial collective-bargaining agreement. However, the parties never reached a final agreement.

On or about March 12, 2021, Respondent received an employee petition (the Petition) bearing a date of February 10, 2021 at the top. The Petition was signed by 8 of the 10 employees in the unit, with their signatures dated on various dates from March 5, 2021 to March 11, 2021. The petition was written by primarily Spanish speaking employees and included both English and Spanish. It stated the following:

"To Whom it My [sic] Concern,

We, the employees of the Hampton Inn, located at 2000 North Ocean Avenue, Farmingville, NY 11738, are stating that we disagree with a union being brought in.

Nosotros, los empleados de The Hampton Inn, ubicado en 2000 North Ocean Avenue, Farmingville, NY 11738, declaramos que no estamos de acuerdo con la incorporación de un sindicato."

There is no allegation in the Complaint that the petition was solicited, assisted or interfered with by Respondent. Nor is there any evidence in the record that Respondent was involved in any way with the creation of the petition or that the petition was tainted in any other unlawful manner.

On March 15, 2021, Respondent emailed a letter to the Union advising that it had received "clear, objective, good faith evidence that a majority of the bargaining unit no longer desire to be represented" by the Union. As a result, Respondent advised it was withdrawing its recognition of the Union as the representative of the unit. The parties have not met to collectively bargain since then.

The General Counsel relies solely upon the language of the Petition in support of its allegation that Respondent unlawfully withdrew recognition. As noted above, there is no allegation of wrongdoing on the part of Respondent in the instigation, preparation or submission of the Petition, nor was any evidence of such conduct presented. Likewise, no separate affirmative

¹ The Charging Party did not file a separate brief.

evidence was presented, apart from the presumption of majority status to which the Union was entitled, that the Union in fact maintained the support of a majority of the unit.

In the absence of any such evidence, the General Counsel and Respondent have stipulated that if the language is sufficient to meet Respondent's burden set forth in *Levitz Furniture*, discussed below, then Respondent was privileged to lawfully withdraw recognition from the Union.

Analysis

Respondent lawfully withdrew recognition based on objective evidence that the Union had actually lost the support of the majority of the bargaining unit employees.

A.. *The Levitz Standard for Withdrawal of Recognition*

The parties correctly agree that when a union has been certified by the Board as the exclusive collective-bargaining representative of a unit of employees it enjoys a presumption of continued majority support that is only rebuttable beginning 1 year after certification, and then only upon a showing that the union no longer has the support of a majority of the unit employees.

This standard for when an employer may lawfully withdraw recognition from a union was set forth in *Levitz Furniture*, 333 NLRB 717 (2001). Prior to *Levitz*, if an employer had "good-faith reasonable doubt as to a unions' majority support" then the employer could choose either to withdraw recognition or seek an RM election to determine a union's continued majority status. *Id.* at 727 citing *Celanese Corp.*, 95 NLRB 664 (1951). However, the Board in *Levitz* determined that the better course would be to have two different standards: a higher standard for unilateral withdrawal of recognition and a lower standard for requesting an RM election. Accordingly, the Board established a two-tiered standard for when an employer may unilaterally withdraw recognition and when it may seek only an RM election.

Under the *Levitz* standard, in order for an employer to unilaterally withdraw recognition from an incumbent union, it must have objective evidence that the union has "in fact" lost its majority support. The Board emphasized that this higher standard is necessary in order to protect the statutory rights of employees to unionize and collectively bargain. It recognized, approvingly, that this higher standard may deter employers from withdrawing recognition out of fear they do not meet the threshold of proving the union has in fact lost majority support. The Board emphasized the need to evaluate "objective evidence" that "reliably indicates" opposition to the union, and not to rely on speculative evidence.

Separately, the Board introduced a new lower standard for allowing an employer to file for an RM election if it has only a "good-faith uncertainty" of the union's continued majority support. The rationale for this lower standard was to encourage employers to utilize RM elections, which are the Board's preferred method of testing employees' support, while disincentivizing the extreme step of unilaterally withdrawing recognition. Indeed, the General Counsel appears to concede that Respondent would have been privileged to do at least that in this case.

In the event an employer is presented with a signed petition by a majority of unionized employees, as here, the Board in

Levitz advised that the employer may withdraw recognition, but only "at its peril." This is because if the union pursues an unfair labor proceeding claiming wrongful withdrawal, the employer has the burden to "prove by a preponderance of evidence that the union had, in fact, lost majority support when the employer withdrew." And if it fails to do so, the withdrawal of recognition will be found unlawful.

The Board in *Levitz* identified certain types of evidence that would meet the "good-faith uncertainty" without meeting the "actual loss of majority" standard. For example, it noted that employees' statements of mere "dissatisfaction" with union performance do not show "opposition to union representation itself," but would contribute to only a good-faith uncertainty warranting only an RM petition. *Levitz* at 728, citing *Allentown Mack Sales*, 316 NLRB 1199, 1208 (1995), *enfd.* 83 F.3d 1483 (D.C. Cir. 1996), *revd.* 522 U.S. 359 (1998).

Similarly, the Board has held that a petition lacking a specific purpose or request was not enough to justify unilateral withdrawal from the union. *Wyman Gordon*, 368 NLRB No. 150 (2019). In *Wyman*, the employer withdrew union recognition after receiving a 5-page petition, of which only two of the five pages indicated the signers no longer wanted union representation. The Board held that because the majority of the signatures were on pages that "do not state the petition's purpose or a request" for the employer to take action, those signatures could not meet the burden of proving majority support was in fact lost.

Additionally, the Board finds statements seeking to withdraw from union "membership" are not proper evidence to support unilateral withdrawal of recognition. See, e.g., *DaNite Sign Co.*, 356 NLRB 975 (2011), where the Board held that an employer may not base its belief of the union's loss of majority support on the number of employees who did not want union membership. Likewise, evidence offered to show employees' opinions about their union are deemed irrelevant where the sentiments of the employees were not known to the employer at the time of its withdrawal of recognition.

For example, in *Pacific Coast Supply, LLC d/b/a Anderson Lumber Co.*, 360 NLRB 538 (2014), the employer unilaterally withdrew union recognition after receiving statements by four employees that included "I would like to exit the union" and "I do not wish to be a union member." The Board found that these statements expressed a desire to terminate only the employees' union membership and/or not to pay union dues, and that they could not be interpreted to mean the employees no longer wanted union representation.

However, an employer who receives a signed petition by employees may lawfully withdraw recognition from the union if the language of the petition is most reasonably interpreted to mean the employees wish to withdraw recognition. *Wurtland Nursing & Rehabilitation Center*, 351 NLRB 817 (2007). In *Wurtland*, the employees presented the employer with a petition signed by more than half the unionized employees that said they wish for a "vote to remove" the union. The Board noted that because there was no other evidence regarding the petitioning process, the analysis of the employer's lawfulness fell solely on the language of the petition.

The Board in *Wurtland* held that the *Levitz* standard does not

require “unambiguous” language in a petition to prove loss of majority. Rather, the Board held that if ambiguity is present, that ambiguity is “merely a factor to be considered.” In that case, because the Board found that the petition included how the employees would vote if a vote was taken (specifically, “to remove”), it held the employer acted lawfully in taking this to be objective evidence of the union’s actual loss of majority support.

The Petition at Issue

Here, the General Counsel argues that Respondent’s unilateral withdrawal was unlawful because the evidence Respondent relied on—solely the Petition—does not objectively prove actual loss of majority support under the *Levitz* standard. It maintains that the employees’ petition language in the present case—that they “disagree with a union being brought in”—lacks clarity and has multiple differing, yet (it argues) plausible, interpretations.

The General Counsel speculates that the language could have meant the employers are unhappy with who brought the union in, or that the employees disagree with a union being brought in for something in the future, or even that their disagreement might be about union membership. It essentially argues that the language of the petition is too unclear and ambiguous to do anything other than speculate as to the employees’ intentions.

The General Counsel also argues that the language of the petition does not show any request for the employer to take a specific action on union representation, or show the employees had any intent to take any action of their own. The General Counsel posits that the word “disagree” here should be read as a statement of sentiment or opinion rather than a demand for action. Because of this, the General Counsel argues the language in the present petition aligns with the passive statements relied on in *Pacific Coast Supply*, which did not meet the burden of proving actual loss of majority support because they were held to be mere opinion and not calls for action.

Finally, the General Counsel defends its critique of the language used in a petition drafted by “lay people,” saying lack of clarity is exactly why the Board distinguished between uncertainty and objective proof, intending for withdrawal to only occur when employee intent was “obvious.” Because it argues the petition was not obvious in stating the employees wanted to withdraw from the Union, the General Counsel argues that Respondent should have filed for an RM election rather than withdraw recognition.

By contrast, Respondent asserts, correctly, that the standard set forth in *Levitz* does not require the language to be unambiguous, only that the most reasonable interpretation be given effect. Therefore, to the extent the employees’ petition is ambiguous, Respondent argues the most reasonable interpretation is that the employees wished the Union had not been brought in, and the only logical conclusion is that they no longer wished to be represented by the Union. Respondent argues that at a minimum, it is more probable than not that if the employees “disagree with a union being brought in,” they clearly wanted the Union “out.”

Respondent compares the present case to *Wurtland*, where the Board found the petition was more reasonably read to say

the employees did not wish to be represented by the union anymore. Respondent notes that if the employees were referring to union membership, they would have said they disagree with “being in” the Union. Instead, the petition is clear in stating the employees disagreed with “a union being brought in.” Respondent further notes that the employees could not have been referring to union membership because this would mean they do not wish to pay union dues, and the employees in this case had not yet been required to become members or start paying dues.

Lastly, both parties acknowledge that this petition was written by primarily Spanish speaking employees, and each recognizes these employees should not be held to a high legally linguistic standard. Respondent asserts that interpreting the petition in any way other than conveying the employees’ desire to end their representation by the Union is an infringement on their freedom of choice. Noting that the work force primarily speaks Spanish, Respondent argues this should not hinder their ability to exercise that choice.

Here, I find Respondent’s arguments much more persuasive. Significantly, there is no allegation in this case that the employee petition was tainted by any conduct on Respondent’s part, and no affirmative evidence that the Union retained its majority status apart from the presumption that Respondent seeks to overcome. Respondent’s withdrawal of recognition is being judged solely based on the language of the petition, since that was the only basis Respondent relied on to unilaterally withdraw recognition of the Union.

Viewed in real-life context, rather than the speculation urged by the General Counsel, what happened here is straightforward. An overwhelming majority of the bargaining unit, without prompting or interference, gathered signatures on a petition which they then presented to their employer advising that they disagreed with having brought in the Union.

This was an extraordinary act, not something employees do without careful consideration or without purpose. The fact that the language used in their petition was not as well-crafted as it might have been does not change what is the only reasonable interpretation of the petition: that the Union no longer enjoyed the support of the majority of the unit and that the employees wanted their employer to know it.

In every Board case where a violation is found, one aspect of the remedy is to order the respondent to post a Notice that recites the rights given to employees by Section 7 of the Act:

- to form, join or assist any union;
- to bargain collectively through representatives of their own choice;
- to act together for other mutual aid or protection;
- or to choose not to engage in any of these protected concerted activities. [Emphasis mine]

Where, as here, an overwhelming majority of the Unit submitted an untainted petition to their employer that I find has only one reasonable meaning—that they do not want the Union anymore—it is their Section 7 right to no longer be represented. And, that choice should not be undone by speculation of what else they might have meant.

Accordingly, I find that Respondent has not unlawfully

withdrawn recognition from the Union, and that Respondent's actions did not violate Section 8(a)(5) and (1) of the Act.

CONCLUSIONS OF LAW

1. Respondent, Island Hospitality Management II, LLC D/B/A Hampton Inn – Long Island Brookhaven, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union, New York Hotel and Motel Trades Council, AFL–CIO, is a labor organization within the meaning of Section 2(5) of the Act that represented a bargaining unit comprised of workers employed by the Respondent.

3. The Respondent did not violate the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The complaint is dismissed in its entirety.

Dated, Washington, D.C. December 1, 2021

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.